

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition

of

HARSHAD SHAH

for Redetermination of a Deficiency or for
Refund of New York State and New York City
Personal Income Taxes under Article 22 of the
Tax Law and the New York City Administrative
Code for the Period July 1, 1992 through
December 31, 1992.

In the Matter of the Petition

of

HARSHAD SHAH

for Revision of a Determination or for Refund
of Sales and Use Taxes Under Articles 28 and
29 of the Tax Law for the Periods June 1, 1991
through August 31, 1991 and March 1, 1992
through May 31, 1993.

In the Matter of the Petition

of

KEWAL K. CHOPRA

for Redetermination of a Deficiency or for
Refund of New York State and New York City
Personal Income Taxes under Article 22 of the
Tax Law and the New York City Administrative
Code for the Period July 1, 1992 through
December 31, 1992.

In the Matter of the Petition

of

KEWAL K. CHOPRA

for Revision of a Determination or for Refund
of Sales and Use Taxes Under Articles 28 and 29
of the Tax Law for the Periods June 1, 1991
through August 31, 1991 and June 1, 1992
through May 31, 1993.

DETERMINATION
DTA NOS.814588,
814589, 814591
AND 814590

Petitioner Harshad Shah, 731 West Street, Harrison, New York 10528-1078, filed petitions for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the period July 1, 1992 through December 31, 1992, and for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 1991 through August 31, 1991 and March 1, 1992 through May 31, 1993.

Petitioner Kewal K. Chopra, 204 West 55th Street, Apt 310 A, New York, New York 10019-5242, filed petitions for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the period July 1, 1992 through December 31, 1992, and for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 1991 through August 31, 1991 and June 1, 1992 through May 31, 1993.

A consolidated hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 13, 1996 at 1:30 P.M., with all briefs to be submitted by June 23, 1997, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). The Division of Taxation, appeared by Steven U. Teitelbaum, Esq. (Brian J. McCann, Esq., of counsel). Petitioners appeared by Robinson, Brog, Leinwand, Greene, Genovese and Gluck, P.C. (A. Mitchell Greene, Esq., of counsel).

ISSUES

I. Whether either or both of the petitioners was a person required to collect, truthfully account for and pay over withholding tax with respect to 211 East 59th Street Restaurant Corp., 1655 Broadway Restaurant Corp. or One Station Square Restaurant Corp., who willfully failed to do so thus becoming liable for a penalty equal to such unpaid tax under section 685(g) of the Tax Law.

II. Whether either or both of the petitioners had sufficient involvement in and control over the activities of any or all of the above-named corporate entities so as to be considered a person responsible to collect and remit sales tax on behalf of such corporations pursuant to Tax Law §§ 1131(1) and 1133(a).

FINDINGS OF FACT

1. At issue in this proceeding are two notices of deficiency and twelve notices of determination issued by the Division of Taxation ("Division") against petitioner Harshad Shah, and one notice of deficiency and five notices of determination issued by the Division against petitioner Kewal K. Chopra. These notices reflect liabilities allegedly owed by petitioners based on their failure collect and remit taxes on behalf of three corporate entities known, respectively, as 211 East 59th Street Restaurant Corp. ("211"), 1655 Broadway Restaurant Corp. ("1655") and One Station Square Restaurant Corp. ("OSS"). Information relative to the notices at issue is as follows:

Notices issued against petitioner Harshad Shah:

<u>DATE</u>	<u>NOTICE NUMBER</u>	<u>TYPE OF TAX</u>	<u>PERIOD</u>	<u>AMOUNT¹</u>
12/10/93	L008311857	Sales and Use	02/28/93	\$13,200.00
12/10/93	L008311858	Sales and Use	11/30/92	\$11,844.52
12/10/93	L008311859	Sales and Use	08/31/92	\$19,771.04
12/10/93	L008311860	Sales and Use	05/31/92	\$ 6,405.80
01/13/94	L008371537	Sales and Use	11/30/92	\$76,477.34
01/13/94	L008371538	Sales and Use	05/31/92	\$50,737.17
01/13/94	L008371539	Sales and Use	08/31/92	\$75,767.18
09/12/94	L009491411	Sales and Use	05/31/93	\$ 300.00
09/12/94	L009491412	Sales and Use	02/28/93	\$14,500.00
09/12/94	L009491413	Sales and Use	11/30/92	\$13,090.03
09/12/94	L009491414	Sales and Use	08/31/92	\$18,488.58
09/12/94	L009491415	Sales and Use	08/31/91	\$ 0.00
01/13/94	L008371696	Withholding	12/31/92	\$14,528.26
09/12/94	L009491218	Withholding	12/31/92	\$ 5,558.50

Notices issued against petitioner Kewal K. Chopra:

09/12/94	L009491416	Sales and Use	05/31/93	\$ 300.00
09/12/94	L009491417	Sales and Use	02/28/93	\$14,500.00
09/12/94	L009491418	Sales and Use	11/30/92	\$13,090.03
09/12/94	L009491419	Sales and Use	08/31/92	\$18,488.58
09/12/94	L009491420	Sales and Use	08/31/91	\$ 0.00
09/12/94	L009491219	Withholding	12/31/92	\$ 5,558.50

2. At the commencement of proceedings, the parties agreed that the dollar amounts listed on the notices are not in question, and that the only issue is whether either of the petitioners should properly be held liable for the payment thereof.

3. Petitioner Harshad Shah has a background in the banking industry, having worked for Manufacturer's Hanover Trust in New York City from 1970 through 1981. Thereafter, he became involved in operating his own real estate business. Prior to 1990, Mr. Shah had not owned any restaurants or been involved in the restaurant industry.

4. As of approximately 1986, Bombay Palace Restaurant Corp. ("Bombay") was the

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The dollar amounts listed represent the amounts of tax due, exclusive of penalty and interest thereon, and inclusive of payments or credits against such amounts of tax. In each instance where payments or credits apply, the same are reflected on the individual notices. In the two instances where the amount of tax shown is zero, the item at issue is penalty only. The three notices pertaining to withholding tax reflect the amount of withholding tax unpaid and asserted against petitioners as a penalty. Finally, the first four notices listed against petitioner Shah pertain to OSS, the next three pertain to 1655, the next five pertain to 211, the next one pertains to 1655 and the next one pertains to 211. All six notices listed against petitioner Chopra pertain to 211.

owner of 10 to 15 restaurants. Thereafter, in 1987, Bombay acquired 50 to 60 additional restaurants from a publicly traded company. On or about September 21, 1989, Bombay filed for bankruptcy protection under Chapter 11 of the United States Code ("the Bankruptcy Code"). According to testimony, Bombay sought bankruptcy protection because of an inability to pay its creditors brought on by financial deterioration following its acquisition of the additional restaurants.

5. In or about August 1990, petitioner Harshad Shah entered into negotiations with Bombay, primarily through its sole shareholder, one Sant S. Chatwal, for the purchase of seven of Bombay's restaurants including the three entities in question here. After review of the financial information for the seven restaurants, Mr. Shah believed the same to be viable profitable entities. The negotiations culminated in or about September 1990 with Mr. Shah's agreement to purchase the seven restaurants. The three corporate entities at issue herein, 211, 1655 and OSS, were all formed in or about October 1990, and Mr. Shah was the sole shareholder and officeholder of all three entities.

6. As part of the negotiations for the purchase of the restaurants, it was agreed that the restaurants would be managed by Bombay pursuant to a management agreement.² Although the management agreements were referred to by the parties and spoken of in testimony (apparently separate but nearly identical agreements were made for the various Bombay subsidiary management companies), none of the agreements was offered in evidence. On or about November 8, 1991, the stock of the three entities (211, 1655 and OSS) was transferred to a corporation known as Ultimate Food Services of NY, Inc. ("Ultimate"). Mr. Shah was, and is, the sole shareholder of Ultimate.

7. Bombay emerged from bankruptcy in the summer of 1991. As part of Bombay's plan of reorganization, the monies realized from the sale of the seven restaurants to Mr. Shah were used to help fund the reorganization. Mr. Shah purchased the restaurants by his assumption of the restaurants' debt, by an infusion of approximately \$500,000.00 of his own money, and by a

²It appears that the separate corporate entities which had previously owned the restaurants, and which were each subsidiaries of Bombay, were engaged to manage the separate restaurants after their acquisition by Mr. Shah.

loan personally guaranteed by Mr. Shah and his wife in the amount of \$6,750,000.00. The loan was to be repaid out of the ongoing operation of the restaurants.

8. At the outset, Mr. Shah arranged for a person on his staff to regularly review the books of the newly-acquired restaurants to verify receipts and expenses. He viewed this person as an "overseer" or "owner's representative" to assure compliance with the terms of the management agreements vis-a-vis timely payments of rents, taxes, etc., and to review restaurant sales and operating cost data. Mr. Shah also retained accountants to prepare quarterly unaudited financial reports and yearly audited statements as required by the bank which had financed the purchase of the restaurants.

9. During the first few months following the acquisition, operations apparently went well and Mr. Shah received some distributions from the restaurants. However, Mr. Shah explained that he began to be "shut out" from obtaining financial information concerning the restaurants shortly thereafter. For example, the audited financial statements required for the period ended December 31, 1991 were not forwarded to the lending bank and the bank, in turn, contacted Mr. Shah. Mr. Shah contacted Mr. Chatwal who reassured Mr. Shah that everything was in order. Mr. Shah began to realize that Mr. Chatwal was intentionally withholding financial information about the restaurants in or about January 1992. Mr. Shah described this situation as a "series of roadblocks", such as information not being made available to the individual designated by Mr. Shah to review the operations of the restaurants, and appointments with Mr. Shah's accountants being rescheduled by Mr. Chatwal to later dates. Mr. Shah realized that Bombay was not in compliance with the management agreements when the lending bank contacted Mr. Shah to advise that the loan was not being paid in accordance with the payment schedule (i.e., partial, as opposed to full, payments were being made). By March 1992, Mr. Shah discontinued the services of the person he had designated to review the restaurants' financial operations, because no information was being provided from the Bombay management companies to be reviewed. From this point forward, Mr. Shah talked directly to Mr. Chatwal on a weekly or biweekly basis concerning the lack of information, nonpayment of the bank loan

and "all other matters."

10. Mr. Shah hired attorneys near the end of 1992 to represent him with respect to the problems at the restaurants. Thereafter, in March 1993, Mr. Shah terminated the management agreements with the Bombay corporations, and commenced operating the restaurants on his own. Mr. Shah considered suing the Bombay management companies, but they filed for bankruptcy and he did not further pursue the matter. Mr. Shah does not dispute that after his takeover of the management of the restaurants, he was properly responsible for the tax filing and payment obligations of the restaurants. He alleges that from the time of his direct involvement, all of such obligations were carried out on a timely basis. He further alleges that he was unaware of the unpaid taxes at issue here until April of 1993 when Mr. Chopra presented him with a list of such outstanding taxes.

11. Prior to his termination of the management agreements, Mr. Shah did not execute documents or sign checks or tax returns (except for one request for a filing extension) on behalf of the restaurant corporations. He did not gain access to the books and records of the businesses and, allegedly due to the management agreements, did not hire or fire any employees, or become involved in the daily operations of the restaurants. He noted that on occasion he attempted to ask questions of the restaurant managers or employees, but found them to be loyal to Mr. Chatwal as their long-time employer and not forthcoming with information concerning the restaurants.

12. Petitioner Kewal K. Chopra first met Sant Chatwal in or about 1967. He started working for Mr. Chatwal in one of Mr. Chatwal's hotels in 1981. In March 1986, Mr. Chopra became a vice-president of Bombay. At this time, Bombay owned 10 to 15 restaurants, and Mr. Chopra assisted Mr. Chatwal in the operation of the restaurants. Mr. Chopra described his duties as overseeing the operation of the restaurants, including assuring that food and labor costs were "in order" and that the restaurants opened and closed on time. His office was located away from the restaurants and at the same location as Mr. Chatwal's office. In 1988, prior to Bombay's filing for bankruptcy protection, Mr. Chopra resigned his office as vice-president and

became a consultant to Bombay. He remained in this role, consulting only with Bombay, until June 1991 when he resumed the office of vice-president of Bombay. He was involved in the preparation of some of the documents pertaining to the bankruptcy filing. His resumption of the office of vice-president coincides with the time of Bombay's emergence from bankruptcy. Mr. Chopra remained as vice-president of Bombay until March 1993, at which time he left employment with Bombay and became an employee and assumed the title of president of Mr. Shah's company Ultimate. This change of employment coincides with the time of the termination of the management agreements and the takeover of operations by Mr. Shah.

13. Mr. Chopra signed tax returns, including sales tax returns, on behalf of the subject restaurant corporations. As vice-president of the management corporations, he also signed checks drawn on the bank accounts of the restaurants. According to Mr. Chopra, and according to an April 19, 1995 letter from Mr. Chatwal, all of these actions were undertaken at the direction of Mr. Chatwal. Mr. Chopra alleged and the Chatwal letter states, that Mr. Chopra had no authority to bind Bombay in any transaction without Mr. Chatwal's authorization. Furthermore, Mr. Chopra stated that he did not sign checks without Mr. Chatwal's approval. In this regard, the bookkeeping staff of the Chatwal organization would prepare a list of payables, present it to Mr. Chatwal for approval and, upon approval, would prepare checks to pay the approved bills. The checks were in turn forwarded to Mr. Chopra for signature. Mr. Chopra described himself as essentially a bookkeeper for the Chatwal companies without any authority or discretion over the payment of bills. He explained that he was not consulted by Mr. Chatwal with respect to the financial aspects of the businesses, and noted that Mr. Chatwal ran the cash management aspects of the businesses. Mr. Chopra did not hire or fire employees of the restaurants and claimed that he had no authority to do so. Mr. Chopra had no stock or other ownership interest in Bombay or in any of the restaurant (or management) corporations. He was paid a salary which was less than that paid to some of the restaurant managers. Mr. Chopra did not meet with banks with regard to negotiating loans for Bombay or its subsidiaries, and he

did not lend any money to Bombay or its subsidiaries.³ The negotiations for the sale of the restaurants to Mr. Shah were conducted between Mr. Shah and Mr. Chatwal, and Mr. Chopra was not a party to or present at such negotiations.

14. Soon after the sale of the restaurants to Mr. Shah, Mr. Chopra was instructed by Mr. Chatwal not to disclose information from the books and records of the restaurants to Mr. Shah. Mr. Chopra stated he did not know the reason for this directive, and explained that in carrying out this order to purposely withhold information he was simply following the instructions of his employer Mr. Chatwal. Mr. Chopra did not make this order not to disclose known to Mr. Shah until after the termination of the management agreements.

CONCLUSIONS OF LAW

A. This matter involves petitioners' potential liability for unpaid sales and use taxes, and for penalties equal to the unpaid withholding taxes, owed by 211, 1655 and OSS. The relevant statutory bases and case law from which such exposure to liability arises will be presented first.

B. With regard to sales and use taxes, Tax Law § 1133(a) states that:

"every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article. . . ."

Tax Law former § 1131(1), in turn, defined "persons required to collect tax" and a "person required to collect any tax imposed by this article [Article 28]" to include any officer or employee of a corporation who, as such officer or employee, is "under a duty to act for such corporation in complying with any requirement of [Article 28]."

C. The mere holding of corporate office does not, per se, impose sales tax liability upon an officeholder (see, Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862; Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427, 430; Matter of Unger, Tax Appeals Tribunal, March 24, 1994, confirmed 214 AD2d 857, 625 NYS2d 343, lv denied

³Mr. Chopra noted that the IRS released him from liability under certain liens it held against him for unpaid Federal withholding tax with regard to Bombay and its subsidiaries. However, documents in the record show that such release pertained to liens running through the period ended September 30, 1989, which is prior to the periods at issue here. The record does not disclose whether the IRS asserted liability against Mr. Chopra for the periods at issue here or, if so, the disposition of such asserted liability.

86 NY2d 705, 632 NYS2d 498). Rather, whether a person is an officer or employee liable for tax must be determined based upon the particular facts of each case (see, Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Stacey v. State, 82 Misc 2d 181, 368 NYS2d 448; Chevlowe v. Koerner, supra, 407 NYS2d at 429; Matter of Hall, Tax Appeals Tribunal, March 22, 1990, confirmed 176 AD2d 1006, 574 NYS2d 862; Matter of Martin, Tax Appeals Tribunal, July 20, 1989, confirmed 162 AD2d 890, 558 NYS2d 239; Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988). Factors to be considered, as set forth in the Division's

regulations, include whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation. (20 NYCRR 526.11[b][2]). As summarized in Matter of Constantino (Tax Appeals Tribunal, September 27, 1990):

"[t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation (Cohen v. State Tax Commn., *supra*, 513 NYS2d at 565; Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536, 538, *appeal dismissed* 69 NY 2d 822, 513 NYS2d 1027; Vogel v. New York State Dept. of Taxation & Fin., *supra*, 413 NYS2d at 865; Chevlowe v. Koerner, *supra*, 407 NYS2d at 429; Matter of William D. Barton, [Tax Appeals Tribunal, July 20, 1989]; Matter of William F. Martin, *supra*; Matter of Autex Corp., *supra*)."

D. With regard to the withholding tax penalty asserted against petitioners, Tax Law § 685(g) provides:

"Willful failure to collect or pay over tax.--Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payments thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

Tax Law § 685(n), in turn, furnishes the following definition of "persons" subject to the section 685(g) penalty:

"[T]he term person includes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

E. The question of whether someone is a "person" under a duty to collect and pay over withholding taxes is a factual one, similar in scope and analysis to the question of whether one is a responsible individual for sales and use tax purposes. Factors which should be considered are, *inter alia*, whether the particular individual signed tax returns, derived a substantial part of his income from the corporation, or had the right to hire and fire employees (Matter of Malkin v. Tully, 65 AD2d 228, 412 NYS2d 186; *see*, Matter of MacLean v. State Tax Commn., 69

AD2d 951, 415 NYS2d 492, 494, affd 49 NY2d 920, 428 NYS2d 675). Other pertinent areas of inquiry include the person's official duties, the amount of corporation stock he owned, and his authority to pay corporate obligations (Matter of Amengual v. State Tax Commn., 95 AD2d 949, 464 NYS2d 272, 273; see, Matter of McHugh v. State Tax Commn., 70 AD2d 987, 417 NYS2d 799, 801).

F. Summarized in terms of a general proposition, the issue to be resolved is whether either of the petitioners had, or could have had, sufficient authority and control over the affairs of the corporations to be considered persons under a duty to collect and remit the unpaid taxes in question (Matter of Constantino, supra; Matter of Chin, Tax Appeals Tribunal, December 20, 1990). In addition, with respect to withholding tax, and unlike the sales and use tax situation, if either petitioner is held to be a person under a duty as described, it must then be decided whether his failure to withhold and pay over such taxes was willful. The question of willfulness is related directly to the question of whether petitioners were persons under a duty, since clearly a person under a duty to collect and pay over the taxes is the one who can consciously and voluntarily decide not to do so. However, merely because one is determined to be a person under a duty, it does not automatically follow that a failure to withhold and pay over income taxes is "willful" within the meaning of that term as used in Tax Law § 685(g). As the Court of Appeals indicated in Matter of Levin v. Gallman (42 NY2d 32, 396 NYS2d 623), the test is:

"whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes No showing of intent to deprive the Government of its money is necessary but only something more than accidental non-payment is required" (id., 396 NYS2d at 624-625; see, Matter of Lyon, Tax Appeals Tribunal, June 3, 1988).

Finally, "corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it for someone else to discharge" (Matter of Ragonesi v. State Tax Commn., 88 AD2d 707, 451 NYS2d 301).

G. In view of the entire record, it becomes clear that petitioner Kewal K. Chopra was not in a position to be held properly responsible to collect and remit either sales and use taxes or withholding taxes on behalf of any of the corporations during the relevant periods. It is true

(and undisputed) that petitioner Chopra signed checks. Furthermore, his name and signature appear on other corporate documents, including tax returns. However, these documents, which at face value place Mr. Chopra in the position of one under a duty to collect and remit taxes, together with his title of vice-president of Bombay, must be weighed in consideration of the overall circumstances of the ownership, control and actual operation of the corporations.

H. First, Mr. Chopra made no investment of his own in the restaurants themselves, and he was not a shareholder in Bombay. He was paid a salary which was less than that paid to some of the managers of the restaurants. Thus, he had no "stake" in the businesses other than the desire and hope that they would succeed thereby continuing the benefit of receiving a paycheck. In contrast, the financial aspects of the businesses were controlled, as was Mr. Chopra's involvement therein, by Mr. Chatwal. Mr. Chopra did not make financial commitments for the businesses, and he was not consulted on such financial matters. Rather, these decisions were dealt with and made by Mr. Chatwal. Mr. Chopra did not hire or fire employees at the businesses. Mr. Chopra signed checks and other documents, as noted, but did not prepare such documents and only signed the same after their approval by Mr. Chatwal. His act of signing was, in essence, performed on behalf of the person actually running the businesses and was an act which carried with it no real authority. Finally, it is significant that Mr. Shah chose to hire Mr. Chopra, notwithstanding that Mr. Chopra, as ordered by Mr. Chatwal, purposefully withheld information about the restaurants from Mr. Shah. It would seem counterintuitive for Mr. Shah to have hired Mr. Chopra under such circumstances, unless it was plausible that Mr. Chopra was acting at the direction of his employer and, more importantly, was in no position to do other than follow the instructions of his employer Mr. Chatwal. Mr. Chopra did not negotiate Bombay's sale of the restaurants to Mr. Shah. Instead, these negotiations were carried out between Mr. Shah and Mr. Chatwal. In sum, Mr. Chopra was an employee without authority or control over the financial decision-making aspects of the businesses, and without the authority by which he could have effected the payment of the taxes in question. Based on the foregoing, it is concluded that Mr. Chopra was not responsible for the collection and

payment of either sales and use taxes or withholding taxes on behalf of 211, and that his failure to have taken on the responsibility and caused the payment of withholding taxes was not willful. Accordingly, the notices issued against petitioner Kewal K. Chopra are to be cancelled.

I. Turning to petitioner Harshad Shah, the main arguments advanced in support of cancelling the notices in question are that Mr. Shah did not exercise any authority over the businesses, and was in fact precluded from doing so by virtue of the terms of the management contracts. Mr. Shah argues that Bombay was operating the businesses on an ongoing daily basis and was responsible for carrying out the duty of collecting and remitting sales taxes and remitting withholding taxes. He argues that the management contracts were a required element of the sale of the businesses to him, as approved by the Bankruptcy Court, and that he was prevented from exercising any control over or having any direct involvement in the daily operations of the businesses. Mr. Shah asserts that he was, in essence, an investor without the authority to carry out the tax payment obligations of the businesses.

J. It is true that Mr. Shah did not physically carry out those actions which would traditionally be viewed as indicative of the duties of one charged with the responsibility to collect or withhold and remit taxes. However, the fact that Mr. Shah did not sign checks or tax returns, save for signing requests for extensions in one instance for each of the corporate entities, does not absolve him of the responsibility of assuring that taxes due were remitted. Rather, the critical question is whether Mr. Shah had, or could have had, the ability to control the affairs of the corporations. In turn, the record as a whole supports the conclusion that Mr. Shah was such a person.

First, Mr. Shah was the sole stockholder, director and officer of the restaurant corporations, who applied for and received liquor licenses and certificates of authority vis-a-vis sales tax on behalf of the three entities. Thereafter, he caused the stock of such entities to be transferred from himself to another entity, Ultimate, of which he was the sole shareholder during the periods at issue. Mr. Shah made a substantial investment in the restaurants and, at least initially, received distributions from the restaurants. Furthermore, while Mr. Shah claims

that the terms of the management agreements precluded him from exercising any control over or having any involvement in the operational aspects of the businesses, such agreements were not offered in evidence and are not a part of the record. Thus, the terms of the contracts, and specifically the limitations, if any, placed on Mr. Shah are simply not known. For instance, it is not known whether the contract terms precluded Mr. Shah's involvement in the restaurants' operations. Similarly unknown are the conditions constituting breach of the contracts, from which one could discern the rights and responsibilities of the parties, including specifically the right to terminate such agreements. It seems an oversimplification to cast Mr. Shah as only an "investor" or "lender" to the businesses. In fact, this claim must be balanced against the fact that he installed a person to monitor the financial activities of the businesses, leaving the inference that in the event of noncompliance Mr. Shah could act. It is also significant that Mr. Shah learned by January of 1992 that creditors (specifically the lending bank) were not being paid as required, and at or about the same time he learned that financial information was being withheld from him. However, in the face of these circumstances, Mr. Shah apparently relied on Mr. Chatwal's assurances that all was in order or would be put in order. Mr. Shah was in communication with Mr. Chatwal concerning all significant aspects of the businesses, including withholding of financial information and bank loan payment problems, on a weekly or bi-weekly basis. Given these factors, Mr. Shah should have reasonably suspected that taxes were not being paid, and should have taken steps to obtain proof and confirm whether or not there was tax compliance. Instead, he attempted to negotiate a settlement with Mr. Chatwal for over a year before he took action to terminate the management agreements. In short, it was not reasonable to accept Mr. Chatwal's reassurances for an extended period without some additional proof of compliance.

Mr. Shah's signing of the requests for extension of time to file tax returns may have been, as claimed, an insignificant formality or ministerial act of no significance. However, the fact that he signed such forms in March 1992, which is approximately the middle of the time period at issue herein, is inconsistent with the claim that he was precluded from having any involvement

with the businesses under the terms of the management agreements. Finally, Mr. Shah seems to claim that the Bankruptcy Court's approval of the sale of the restaurants, with the attendant agreement that Bombay was to serve as manager for the restaurants, itself somehow establishes that Mr. Shah was precluded from having any involvement in the restaurants. Such an assertion overlooks the fact that the terms of the sale, including the management agreements, were negotiated by and between Mr. Shah and Mr. Chatwal, that Mr. Shah did eventually terminate the agreements and, most importantly, that the agreements are not in evidence thus leaving unknown the extent, if any, to which Mr. Shah was "precluded" from exercising control over the restaurants. In sum, the evidence simply does not bear out the claim that petitioner Harshad Shah was not one with the ability and under a duty to carry out the tax payment obligations of the restaurants.

K. The petition of Kewal K. Chopra is hereby granted and the notice of deficiency and notices of determination issued against him dated September 12, 1994 are cancelled. The petition of Harshad Shah is hereby denied and the notices of deficiency dated January 13, 1994 and September 12, 1994, respectively, and the notices of determination dated December 10, 1993, January 13, 1994, and September 12, 1994, respectively, issued against him are sustained.

DATED: Troy, New York
December 11, 1997

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE